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United States District Court
Southern District of California

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) Case No. 10-CR-4246 JM
)
AHMED NASIR TAALIL MOHAMUD,) Friday, January 31, 2014
) Judgment & Sentence
Defendant.)
)

Before the Honorable Jeffrey T. Miller
United States District Judge

Appearances:

For the Government: Laura E. Duffy
UNITED STATES ATTORNEY
William P. Cole
Caroline P. Han
ASSISTANT U.S. ATTORNEYS
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For the Defendant: Thomas A. Durkin, Esq.
DURKIN & ROBERTS
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Official Interpreter: Fanik Jama, CCI

Official Court Reporter: Debra M. Henson, CSR, RPR
U.S. Courthouse
333 W. Broadway, Suite 420
San Diego, CA 92101
(619) 238-4538

Record produced by stenographic reporter

1 San Diego, California - Friday, January 31, 2014

2 (Defendant is being assisted by a Somali interpreter.)

3 THE CLERK: Calling matter 1 on calendar,
4 10-CR-4246, USA versus Ahmed Nasir Taalil Mohamud, set for
5 sentence with presentence report.

6 THE COURT: Counsel, would you like to state your
7 appearances, please.

8 MR. COLE: Yes. Good morning, your Honor. William
9 Cole and Caroline Han for the United States.

10 THE COURT: Thank you, Mr. Cole.

11 MR. DURKIN: Good morning, Judge. Tom Durkin on
12 behalf of the defendant, who's present and in custody.

13 THE COURT: Okay. Thank you all. Both sides are
14 ready to proceed with sentencing I assume.

15 MR. DURKIN: We are, Judge.

16 THE COURT: All right. Mr. Nasir, I'll refer to
17 you as Mr. Nasir if that's acceptable.

18 THE DEFENDANT: Yes.

19 THE COURT: Okay. Very good. Mr. Nasir, are you
20 ready to proceed to sentencing this morning?

21 THE DEFENDANT: Yes.

22 THE COURT: All right. Thank you. And has the
23 probation report been read to you, Mr. Nasir?

24 THE DEFENDANT: Yes.

25 THE COURT: As well as the addendum to the

1 probation report, that part of it that came in later?

2 THE DEFENDANT: Yes.

3 THE COURT: All right. Very good. I have read and
4 considered -- we have three counts of conviction, first of
5 all, the first being conspiracy to provide material support
6 to foreign terrorists, the second being conspiracy to provide
7 material support to a foreign terrorist organization, and
8 then money laundering is the third count.

9 All the sentencing materials that have come in I've
10 reviewed obviously: The original probation report, the
11 objections -- both sides filed objections to the PSR, there
12 was an addendum, which I read and considered, another
13 document entitled Amended Presentence Report that really did
14 not vary from the original, but there did -- there was the
15 addendum; the addendum did purport to address objections by
16 both sides. The sentencing memoranda, plural, submitted by
17 you, Mr. Durkin, the letters that came in just recently, I've
18 reviewed those, I've reviewed the sentencing memoranda --
19 once again plural -- submitted by the government, the
20 sentencing summary charts. I've considered the nature and
21 circumstances of the offenses and history and characteristics
22 of Mr. Nasir as well as the advisory guidelines and the
23 statutory purposes of sentencing.

24 Let me, before I hear from counsel and then Mr.
25 Nasir, just indicate for the parties what my thoughts are on

1 the objections that have come in. We have factual objections
2 submitted by the defense, and as to the factual objections --
3 I think there are seven, yes, seven of them altogether -- I
4 would adopt the responses of the probation officer as they're
5 set forth in the addendum to the PSR, that being document
6 335.

7 With respect to the first, the first objection
8 relating to the sentencing date, obviously the sentencing is
9 today, January 31st of 2014. The PSR should reflect that and
10 will ultimately.

11 As to credit -- this is the second objection now --
12 as to credit for Mr. Nasir, obviously he should receive
13 custodial credit to today, January 31st, 2014.

14 And as I indicated, the factual objections, I
15 would -- I would look to the responses in the addendum, adopt
16 those, and also indicate that none of the factual objections
17 or the subjects therein are going to be material for any
18 sentencing choice I'm going to make in this case.

19 With respect to the legal -- the guideline and
20 legal disputes, I would -- I would address those in the
21 Court's allocution at various points, so I'll have an
22 opportunity to address each and every one of those matters.
23 So, Mr. Durkin, are you ready to proceed on behalf of Mr.
24 Nasir?

25 MR. DURKIN: I am, Judge.

1 THE COURT: All right.

2 MR. DURKIN: And so it's clear, we realize you made
3 rulings in the other case that would apply; I acknowledged
4 that in our papers, and we don't need to quarrel with those
5 today.

6 THE COURT: Okay. I saw those, and so I've -- I'm
7 going to be responding to the specific points that you've
8 raised in terms of sentencing and/or guidelines issues. I
9 believe that with respect to the guideline calculations,
10 specifically what you raised was an objection to the
11 enhancement, the plus-12 enhancement under 3A1.4. You
12 incorporated some arguments made earlier by other counsel in
13 the consolidated briefing for the three co-defendants, and
14 I'll address those in my allocution.

15 MR. DURKIN: That's fine.

16 THE COURT: And then there was a request for role;
17 you made alternate references to minor or mitigating role --

18 MR. DURKIN: That's right.

19 THE COURT: -- in this case, but of course insofar
20 as that issue is concerned relating to the advisory
21 guidelines, as I'll state a little bit later, adjusting
22 downward two levels or four levels such as you've indicated
23 for role really doesn't take into account the issue of role.
24 I think role has to be properly addressed within the concept
25 of a 3553 (a) analysis.

1 MR. DURKIN: I agree.

2 THE COURT: It just doesn't make any difference,
3 material difference, if you're looking at the guidelines.
4 And I think the government understands that too. Ultimately
5 the government is looking -- looking at their recommendation
6 as recommending what they would consider to be a fraction, a
7 relatively small fraction, about one-third of what they
8 assert the advisory -- the combined advisory guideline range
9 would be for these counts of conviction. You're recommending
10 something less than that even so. The guideline analysis is
11 of limited value obviously. I'll get into all of that.

12 MR. DURKIN: I agree.

13 THE COURT: All right. Well, why don't you proceed
14 then with your allocution.

15 MR. DURKIN: You want me to --

16 THE COURT: Oh, please. I think that'll be easier
17 for those in the courtroom as well as Ms. Henson, the court
18 reporter. Thank you.

19 MR. DURKIN: That way I don't get confused with the
20 translator. Judge, I don't have a terrible amount to say
21 more than what we have said in our papers, but I want to
22 comment on a couple things that I've said in the papers. But
23 before I get to that, there are two other things that I
24 didn't mention in the papers; I suppose maybe I should have
25 at least mentioned one of them, but I think you're aware of

1 it; you've been around far more than I have.

2 One of the factors that I think you could take into
3 account under 3553 (a) is that he will be likely -- when he's
4 released, he will end up in immigration custody, and it's my
5 experience that in countries such as Somalia, it's sometimes
6 difficult to get deported even if he -- they call it excluded
7 I think -- but even if he's agreeing to it, which he will do
8 because he wants to get home as quickly as he can, he's
9 likely to end up in detention for some period of time.
10 Some -- and I've had clients where it's been significant.
11 And one of the problems that gets created with that is that
12 you have to have travel documents. Even somebody with -- I
13 had a client, for example, not too long ago who was from
14 India, and because his passport had expired, he couldn't -- I
15 think he spent like six months extra just as a result of
16 that. So I think that's a factor you could -- I'd ask you to
17 at least consider in terms of under 3553 (a) as to
18 circumstances of this particular defendant as he now sits
19 here.

20 The other thing that I -- and I guess I'll go to
21 the comment I made, which sometimes you say things and it's
22 hyperbolic and other times it's just not. I told you that
23 this was the saddest case I had had, at least -- if not the
24 saddest, one of the most sad cases that Ms. Roberts and I had
25 ever had in the 75 years we've been practicing, not -- those

1 are collective --

2 THE COURT: I understand they're combined.

3 MR. DURKIN: -- collectively, not temporally,
4 although sometimes it feels like it's been 75 years. I am --
5 in many ways this case troubles me more than so many other
6 cases I've handled because of the sadness of it. And I'm not
7 criticizing the government for bringing the case; I'm not
8 criticizing anything other than sometimes the law can be an
9 ass, as somebody once said, or sometimes the law can be
10 overly harsh. I know you've tempered your other sentences
11 though, so I'm not suggesting that we're in that type of a
12 dungeon. But one of the things that's always bothered me
13 about Mr. Nasir's case is -- and I did mention this in a
14 footnote -- you remember that he was indicted separately
15 here. I think -- and I don't want to get carried away with
16 this, but I think that one of the saddest things or one of
17 the most unfortunate things as far as Mr. Nasir is concerned
18 is had he had competent counsel at that time, I think a case
19 could be made that he would have been a good witness for the
20 government, and I wonder what would have happened had that
21 been the case. And that's -- and we had -- I had attempted
22 to try to resolve the case with Mr. Cole, and I found him to
23 be very cooperative, but we just couldn't. And he only went
24 to trial to contest what I thought was at least a decent
25 argument over the scope of his role in the conspiracy and

1 what his agreement actually was with this agreement because
2 he is admittedly less culpable and doesn't have the same
3 connections as the others. But I don't want to have a debate
4 over all that today. You saw the evidence, and I'm not --
5 I'm not trying to claim innocence by any stretch of the
6 imagination; that's not what I'm suggesting, and I'm not
7 being critical of the prosecution at all. What I am
8 suggesting, however, is that he was twice interviewed by the
9 government before he was arrested, both times coming back
10 from Africa having seen his family. I think it's sad and
11 unfortunate for him that he wasn't able to obtain good
12 counsel then and maybe a lot of things would be different
13 today.

14 But forgetting all that, I can't get off of the
15 image of what kind of trauma he must have had to go through
16 to receive word that his daughter died of malnutrition. And,
17 again, I'm not -- I don't want to argue that somehow this was
18 a wrong-headed prosecution, but -- and I'm not saying that;
19 I'm not suggesting that at all. What I am saying -- and I'm
20 not going to get into all politics of it. But what I am
21 saying is that I think the -- I called it ironic and tragic;
22 maybe those are not necessarily 100 percent on the money, but
23 the awfulness of the idea -- and I think even Mr. Cole, if --
24 if I'm not mistaken, in his closing argument, one of the
25 closing arguments, acknowledged that some of the money might

1 have been going to -- for, you know, altruistic or, you know,
2 for feeding the hungry and so forth. But as the law states
3 and you instructed that it's -- the question is -- that's not
4 the question -- did it go to a foreign terrorist
5 organization, and we accept the verdict on that.

6 But I just don't know what -- it's just horrible.
7 It's just a horrible, horrible conflation of events that
8 someone who brought a thousand dollars down to a hawala in
9 San Diego and has now served 38 months would have to live
10 through this. And we laid out his history in this country.

11 One of the things that has always moved me so much
12 in this case is the first conversation I ever had with him
13 where he described to me what was going on in Cairo when he
14 got to Cairo as a refugee, and I think the story goes
15 something like this. He tried the lottery the first time and
16 didn't get it -- he wanted to come, as we said in our papers,
17 to either here or Australia -- and somehow he was able to get
18 a second chance, if I remember correctly, at the lottery.
19 And the way he described his emotions on the day he got the
20 word that he had won the lottery to come to the United States
21 is enough to bring tears to your eyes. And if you listen to
22 his history as to what he's done -- I mean he went to
23 Virginia and he worked as a house -- in the housekeeping
24 department; and then he goes to Ohio and he works in a pet
25 food factory; and then he's told that he could get a job

1 driving a cab in -- in St. Louis, where he meets Moalin.
2 He'd have been better off staying at the pet food factory,
3 staying in Ohio, as the events of his life have unfolded.
4 And then he comes to California because they can make more
5 money driving a cab in California. And you just go wow, you
6 know, this is an amazing, amazing situation.

7 You know, Chicago is a -- is an ethnic town, and we
8 all have great stories about our -- the Irish, for example,
9 like I am, have great connections to their roots, and there's
10 always these stories about the guy that first got here. In
11 my family it was Patrick Durkin, who I frequently say until I
12 graduated from Notre Dame in 1968, the greatest
13 accomplishment of a Durkin in Chicago, or at least our
14 Durkins, was that Patrick Durkin drove the first streetcar
15 down Wentworth Avenue, which was a big deal. And you look at
16 this whole ethnic immigration story that the myth of our
17 country is built on, and he is part of that. And not that --
18 not that there's any perfect analogies, but, you know, God
19 forbid that they ever prosecuted the Irish for sending money
20 back home to the IRA. And I'm -- again, I'm not being
21 critical of this prosecution. I'm saying -- and I'm not
22 excusing the conduct. I'm simply saying as a mitigating
23 factor, it's a -- it's something that I think you could
24 consider because it moves me; his story has moved me and Ms.
25 Roberts.

1 I understand all the factors you have to consider,
2 and I trust that you will do that fairly. I come to have
3 great respect for you. But I do say that sometimes there
4 comes a case where it's so different -- and I think his
5 situation with his daughter is so different -- that the
6 number I'm asking for is not out of line.

7 He's got 38 months in. If he were to get only 48
8 months, he would be out in three months. By my calculations,
9 even in a worst-case scenario, if he spent nine months, which
10 sometimes happens in immigration, you know, that's -- that
11 would be almost 50 months. I think that's a sentence that's
12 sufficient. I understand where the government comes from and
13 I understand what they're asking for, but I just think that
14 he's different. Even evidentiary-wise -- and I don't want to
15 belabor that; if I had to do it over again, I might have
16 tried that case differently too, but we won't get into that.

17 I just think he is someone caught up in a -- what I
18 described in my papers as a true nightmare. He did have the
19 American dream, and it's now turned into a nightmare for him
20 through nobody's fault but his own, and he understands that,
21 which is also part of the same nightmare because it's -- if
22 ifs and buts were candy and nuts, everybody'd have a merry
23 Christmas, you know; but for his relationship with Mr. Moalin
24 that starts in St. Louis, maybe his whole family is here by
25 now. Maybe there's a whole different result; maybe he owns a

1 fleet of cabs, I don't know, but here he is. He has handled
2 this incredibly gracefully I think, and the thing I am most
3 impressed with him by is his great faith, which ironically is
4 part of what ultimately caused him to be here because that's
5 where he's made some of the associations.

6 I do think he wants to say a couple of words. I
7 know one of the things he wants to say that he is sorry for
8 involving himself in this, but I'll let him say that, your
9 Honor.

10 THE COURT: Thank you, Mr. Durkin. Mr. Nasir, you
11 do have an opportunity to make any statement you wish to
12 make. And if you'd like, you can remain right where you are
13 seated and proceed with your statement, and of course it will
14 be interpreted for the rest of us.

15 THE DEFENDANT: I would like to say to the judge
16 the little over three years that I was in this situation, I
17 faced a lot of different problems. Not only me, but the
18 majority of the problems were faced by my family.

19 I am requesting from the judge to give me an
20 opportunity to salvage and save what's left of my life. And
21 I would like to say to the judge again, to tell the judge
22 that I am really very sorry, very sorry that I was part of
23 this case. Thank you, your Honor.

24 THE COURT: Thank you, Mr. Nasir. Mr. Cole?

25 MR. COLE: Thank you, your Honor. We don't plan to

1 belabor the facts or the situation either. Your Honor's
2 lived with this case for so long now and presided over the
3 trial and the other sentencings and we submitted papers, so I
4 won't -- I'll answer any questions the Court may have, but I
5 won't belabor Mr. Nasir's role or the offense conduct.

6 We acknowledge in the papers and for the --
7 consistently in sentencing in terms of recommendations that
8 Mr. Nasir was the least culpable of the four that we brought
9 to your Honor in this case. Our recommendation as to his
10 sentence was made at a time when we were recommending as to
11 all defendants at the same time. Your Honor's imposed
12 different sentences, and we ourselves don't think it would be
13 just for this defendant to receive more time than his
14 co-defendants, and so we defer to the Court. You gave Mr.
15 Doreh ten years in custody. We had recommended a lower
16 sentence for Mr. Nasir than Mr. Doreh, and so we defer to the
17 Court as to the appropriate sentence now that you've had all
18 the parties' papers and have presided over the case. We feel
19 it ought to be somewhat proportional to what our initial
20 recommendation, you know, pattern was in terms of
21 proportionality, but we also would think it appropriate for
22 him to have a less sentence than his co-defendants, and since
23 they've been sentenced now, that changes things from where we
24 started with our recommendations.

25 That being said, the only thing I'll mention is I

1 am certain that there's a -- the whole situation in Somalia
2 at the time this offense conduct was going on, it's a
3 complicated thing, and I'm sure there was a fog of war
4 hanging over the whole thing perhaps. But, you know, at
5 bottom, we had people in the United States who were talking
6 about real people's lives over there; the people who the
7 bullets were going to be directed at, the violence would be
8 directed at were real people, and it was a serious offense.
9 And it -- we can't just act like those people somehow are --
10 weren't real people on the other end or weren't as important
11 because they were far away. And so it is a serious offense.
12 But in light of the sentencing ranges that have already been
13 applied by your Honor -- I shouldn't say ranges -- the
14 sentences that have been imposed, we would just simply defer
15 to the Court and recommend that he be sentenced to reflect
16 his least culpable role among the four. Thank you, your
17 Honor.

18 THE COURT: Thank you, Mr. Cole. All right. Well,
19 let's begin with a guideline analysis here. The original PSR
20 set forth groupings for the -- individual groupings, I should
21 say, for the counts of conviction and concluded with a
22 guideline range of life. And objections were filed, and the
23 PSR addendum came in. And these are by way of preliminary
24 observations; once again, I'm sure everybody can appreciate
25 that.

1 The addendum came in. It made some corrections,
2 and then ultimately recommended 50 years but still concluding
3 with a group analysis I think down to two groups. After --
4 after the -- perhaps even in the course of the initial round
5 of sentencings there where I was grappling with the issue of
6 grouping and all of that and, as I stated earlier for the
7 other defendants, it seemed to me everything should be
8 grouped under 3D1.2. And I think by the time that we were
9 done with all of the sentencings in those other matters,
10 everyone was on the same page. I think Probation's
11 persisting in their thinking that this should go forward as a
12 group analysis, but I just don't think that's the proper
13 analysis here. In any event, the submissions by Probation
14 are what they are.

15 Of course, the Court must start with the guideline
16 analysis under the law; that's where we begin these things.
17 And I don't know that it was the purpose of the defense to
18 provide a thorough guideline analysis; I think, gleaning from
19 what's been set forth in the defense papers, there's always
20 been a reliance on a 3553 (a) analysis rather than a
21 guideline approach here, and the only guideline analysis or
22 submission from the defense is, in effect, as I stated
23 earlier, an argument that the 12-level enhancement under
24 3A1.4 should not apply and that there should be a downward
25 adjustment for minor or minimal role for Mr. Nasir and that

1 whatever the advisory guideline analysis ultimately is and
2 whatever the guideline range is for these offenses -- even
3 assuming a total offense level of 34 and a criminal history
4 category of I, if you don't kick it up to a VI under 3A1.4,
5 that a four-year sentence is appropriate under 3553 (a).

6 The government does -- does engage in a full-blown
7 guideline analysis with an enhancement of plus 12 under 3A1.4
8 resulting in a total offense level of 43 with a criminal
9 history category of VI with life then being reduced to 50
10 years, as I understand the government's position, by totaling
11 the statutory maximums for each of the three counts of
12 conviction. And ultimately the government made a certain
13 recommendation, which obviously today is being modified by
14 Mr. Cole in light of what the Court has imposed for the other
15 defendants.

16 So what follows is my own guideline analysis here
17 as is required in an approach -- and as I say and I'll
18 continue to say probably throughout the allocution here --
19 the guideline analysis is of so little use, in my view, in
20 analyzing this case. But to begin with, the three counts of
21 conviction, as I've stated, are grouped under 2X1.1 relating
22 to conspiracy and 2S1.1 related to money laundering and
23 ultimately under 3D1.2 because the offense behavior was
24 ongoing and continuous in nature; and perhaps even more
25 accurately and put in a bit of a different way, the offense

1 conduct all took place with a common purpose, that being
2 supporting terrorism. And so if you take a look at
3 application note 6 to 2S1.1, you'll see that there is an
4 emphasis on the need to group all of these counts together,
5 including even the money laundering count, where there's a
6 common purpose here.

7 So the base offense level is a 33. It is increased
8 by 12 levels under 3A1.4, under (a) of 3A1.4. That increases
9 the total offense level to a 43, and under 3A1.4 (b), that
10 increases the criminal history score in a rather draconian
11 fashion from a I to a VI.

12 And so beyond any reasonable doubt, I would, once
13 again, find, as I have in the past, and do find that these
14 offenses were calculated to influence or affect governmental
15 action through intimidation and coercion, and it cannot be
16 gainsaid that al-Shabaab is a -- or was, relevantly, in this
17 case, a brutal and militant terrorist organization; I think
18 everyone is in agreement there. The defense was, although
19 this is that kind of an organization, this particular
20 defendant, as well as the others, were not involved in
21 supporting this organization. But everyone agreed that this
22 was an organization that engaged in bombings, including a
23 bombing of the presidential palace, assassinations, ambushes,
24 the uses of explosive devices and firearms of all kinds in a
25 campaign to terrorize and defeat the Transitional Federal

1 Government, the TFG, in Somalia, including its associated
2 entities and countries and forces, including those from
3 Ethiopia and African Union members.

4 So with a total offense level of 43 and a criminal
5 history category of VI, the initial advisory guideline range
6 of life must give way to the statutory maximums for these
7 counts, which would be 15 years on Count 1, 15 years on Count
8 2, and then 20 years on Count 3. I know the government and
9 Probation have been engaged in an exercise where the
10 statutory maximums are automatically stacked or combined, and
11 where Probation and the government arrive at a combine
12 advisory guideline range of 50 years, which the government
13 refers to as total punishment, end quote, as that term is
14 used in 5G1.2.

15 Reasonable minds can differ on this, and I think
16 going through these sections and trying to shoehorn some of
17 these sections into the specifics of this case is a
18 challenging analysis, ultimately not really meaning much
19 because, as I say, the guidelines themselves are of limited
20 value here. But I think the better analysis is not to merely
21 add the statutory maximums to reach a guideline range, a
22 combined advisory guideline range, of 50 years -- that being
23 the amount of total punishment that the government urges --
24 but in a case like this to recognize that the advisory
25 guideline range for each count is the respective statutory

1 maximum for that count, to recognize that these counts are
2 grouped together under 3D1.2 because they represent the same
3 harm, and then calculate the, quote, total punishment,
4 unquote, as the just and fair sentence, and then apply the
5 individual sentences in either concurrent or consecutive
6 fashion to reflect total punishment; that's my reading of
7 5G1.2. And regardless of whether the advisory guideline
8 approach to be followed is that of the government or
9 Probation or the defense, the guideline range, insofar as
10 it's a function of adding all the statutory maximums, is of
11 little value. So that's pretty much where I come down on
12 this particular issue. The extent -- to the extent the
13 guideline range for these counts of conviction could be
14 properly construed as the adding, the process is virtually
15 devoid of value. And I don't know how significant this issue
16 is for the government. I know that there was -- there was
17 disagreement in the first round. I can certainly proceed at
18 some length, Mr. Cole, on how I --

19 MR. COLE: No.

20 THE COURT: -- how I see the commentary of 5G1.2
21 with examples; I did that the first time around. I don't
22 know that it's necessary here, but if you'd like the record
23 to be perfected in this manner, I'm certainly --

24 MR. COLE: I think the record's perfected. We -- I
25 know the first time around, we had -- we followed the same

1 approach, but we hadn't explicated it well, and you mentioned
2 that you felt we hadn't perhaps explained enough how we
3 calculated the guidelines, so we submitted a supplemental
4 sentencing memorandum --

5 THE COURT: Yes.

6 MR. COLE: -- to give you our logic, and I think
7 that that's our position. And if your Honor has reached a
8 different one. I think the record's perfected from the
9 standpoint of us disagreeing with the Court's approach to the
10 guideline calculations. But I don't think we need to belabor
11 it any further than what's already in the record.

12 THE COURT: But my view of it is it's rather moot
13 in a case such as this. I don't know if you agree with that,
14 but --

15 MR. COLE: No, I -- I don't agree with that I guess
16 from the standpoint that -- I agree obviously that we are
17 recommending the sentence that's not even close to a
18 guideline sentence, not even close, and so from that
19 standpoint, I agree. But I suppose, just for terms of
20 perfecting the record, since no matter what the ultimate
21 sentence is, you always have to start with the calculation of
22 the guidelines, and that cuts against us often, and I need to
23 preserve it the other way as well I suppose. So I guess from
24 that standpoint, we can never avoid the issue of whether the
25 guidelines are calculated correctly as a starting point. So

1 we're just preserving that, your Honor, but I think it's
2 preserved unless you have further questions on the issue.

3 THE COURT: No. I think it's an interesting issue.
4 I would wrap this up -- I mean, as I say, I could go on with
5 examples. I know I used an example during the first round;
6 I've certainly come up with others as well. And as I say, I
7 think -- I think reasonable minds can certainly differ on
8 this issue and the reading of 5G1.1, 5G1.2, the commentary.
9 But let me just conclude by saying that, in my view, the term
10 "total punishment," quote, unquote, as that term is defined,
11 is defined as that which is determined by the Court after
12 determining the combined offense level and the criminal
13 history category and determining the defendant's advisory
14 guideline range in a particular case. I think it's
15 determined after the guideline analysis but obviously before
16 sentencing, which is when the concept of total punishment
17 comes in.

18 I guess the issue is what does that term mean,
19 "total punishment." Nothing -- interestingly, nothing in
20 5G1.2 or the commentary states expressly or suggests that in
21 a multiple-count case, the advisory guideline range or the
22 combined advisory guideline range is an automatic adding of
23 the statutory maximums where the counts are grouped under
24 3D1.2 and the statutory maximum for each count exceeds the --
25 or is exceeded by the advisory guideline range, thus

1 rendering the statutory maximum as the guide -- as the
2 advisory guideline range for the individual count. Nothing
3 in 5G1.2 or the commentary deals with this kind of a
4 situation, so we're left to try to interpret what these
5 things mean. So --

6 MR. COLE: Well --

7 THE COURT: -- in any event -- go ahead.

8 MR. COLE: -- on that point, your Honor, I think
9 that maybe the crux of our differing views on the subject
10 comes down to the point of the 3D section is to get one
11 guideline range. And at that point everything is grouped, so
12 you're no longer really looking at a guideline range based on
13 counts; you're looking at a guideline range for the case
14 because we've all agreed now that they all should be grouped.
15 And so -- you know, our position is it's inconsistent to
16 group them all, come up with one guideline range for the
17 whole case, but then come up really with a separate guideline
18 range for each count under 5G1.1. 5G1.1 really doesn't apply
19 because it's not a single-count case. You don't even go to
20 5G1.1 --

21 THE COURT: Well -- and it says single count; in
22 the heading it says -- it indicates that it applies for
23 single-count cases --

24 MR. COLE: Right.

25 THE COURT: -- 5G1.1.

1 MR. COLE: Right. And so we believe you go to
2 5G1.2, and our -- although it is not explicit in the
3 guidelines in bold lights by any means -- and it could be
4 much more clear, we believe, too -- but we do believe that
5 before you can get on to the next section -- it talks about
6 the departure sections, refers to the fact that you've
7 already completed your 5G analysis --

8 THE COURT: Sure.

9 MR. COLE: -- before you determine departures. And
10 so our point is if there's a combined offense level for the
11 whole case -- so there's only one combined offense level; you
12 can't have multiple offense levels by the time you get to the
13 departures analysis -- then you -- the total punishment has
14 to be the total advisory guideline punishment before you
15 apply the departures. And so our position is simply that we
16 all can talk about whether the guidelines make a lot of sense
17 in this case or not for the -- for the offense conduct, but I
18 think we are stuck with the advisory guidelines being 50
19 years and with the departure or variance coming from there,
20 in our view. And that's why we think they do stack
21 automatically because you have to reach the total punishment,
22 and here the total punishment -- under the Ninth Circuit law,
23 the total punishment is supposed to be from within the range.
24 It is where the judge picks within the range, the advisory
25 range, and some of the problem is a lot of the cases that

1 discuss total punishment discussed it when the advisory
2 guidelines were still mandatory, and you have to step back
3 for a minute, and -- and the language they're using is, you
4 know, the judge had to pick a sentence from the range. And
5 we hear that now and think no, the judge doesn't have to pick
6 a sentence from the range, but at that stage in the analysis,
7 it's still an advisory analysis that it has to go through.

8 And so our position is that -- well, I've made our
9 position clear I think. But anyways, we believe it is a 50
10 because you can only have one -- one range for the whole
11 case, not -- not per count. And with that we'll submit, your
12 Honor.

13 THE COURT: Okay. Very good. In any event, I'll
14 refrain from spending much more time on this other than to
15 say -- to complete the advisory guideline analysis here. I
16 would deny any downward adjustment for role -- getting back
17 to the traditional analysis -- as role is more appropriately
18 considered on a 3553 (a) analysis. And I also recognize
19 there are no express departures that have been made by the
20 defense here. And so the counts result in advisory guideline
21 ranges of 15 years for Counts 1 and 2, 20 years for Count 3.

22 One thing I want to make clear -- I think I've made
23 it clear already but just to button this up -- regardless of
24 whether the government is correct in reaching a combined
25 advisory guideline range of 50 years, or my guideline

1 analysis is correct, my ultimate sentencing decisions in this
2 case are based on the 3553 (a) analysis and other relevant
3 considerations and would not be affected by the concept of a
4 combined advisory guideline range analysis resulting in a
5 total of 50 years. So let's get to the 3553 (a) analysis
6 because I think that's where this case rests.

7 First we look to the nature and circumstances of
8 the offense, and we're looking at a -- significantly at the
9 seriousness of the offense at the particular point. These
10 offenses were very serious. I've said it before, I'll say it
11 again: They provided support for and buttressed a campaign
12 of terror by al-Shabaab consisting of the targeted bombings,
13 assassinations, murder, and mayhem with the purpose to
14 terrorize and disrupt and defeat the legitimate Transitional
15 Federal Government, as I've indicated previously, and in
16 their efforts to bring some peace and order to war-torn
17 Somalia.

18 Mr. Nasir's participation was limited as I see it,
19 and I know the government has recognized this in its papers;
20 I think Mr. Nasir's participation was limited when it's
21 compared to the other defendants. He did plot and plan with
22 defendant Moalin about raising money for -- from Orange
23 County cab drivers to support the efforts of al-Shabaab.
24 This took place over -- well, a number of calls; I think
25 there were about a dozen calls all together, one of which,

1 interestingly, right after defendant Moalin's call with Aden
2 Ayrow in which defendant Moalin offered his home for
3 nefarious purposes; that was within just a few days, that is,
4 the conversation -- one of the conversations between Moalin
5 and Nasir was just a few days within the infamous call
6 between Moalin and Aden Ayrow where Moalin offered his home.

7 Mr. Nasir was involved with collecting and
8 depositing approximately \$1,000 in an account that was
9 associated with Shidaal Express. He had no direct contact
10 with any of the other defendants aside from the telephone
11 conversations he had with Mr. Moalin, someone he had met in
12 St. Louis. So the level of participation I think is a very,
13 very important mitigating factor here.

14 With respect to the history and characteristics of
15 Mr. Nasir, obviously there are several other equities. It is
16 here where I think the equities for Mr. Nasir principally
17 lie. He has no criminal history; he's led a law-abiding and
18 productive life. Mr. Durkin, you outlined those I think
19 pretty effectively. From the time he became a refugee,
20 leaving Somalia, then through Egypt, waiting for the lottery,
21 coming to the United States, first to Virginia, doing some
22 housekeeping there; then on to Columbus, Ohio, and the pet
23 food industry; then on to St. Louis driving a cab; and then
24 ultimately on to Orange -- Orange County. So this covers an
25 approximate 10- to 11-year period of time I think up until

1 the time he was apprehended in this particular case.

2 I am mindful certainly of the fact that he has
3 been -- or was sending money home to support his family, his
4 wife and young children. And I think what you were trying
5 to -- the point you were trying to make, if I could
6 paraphrase what you were saying, Mr. Durkin, is that what
7 your client here, Mr. Nasir, was doing was cultural; this is
8 something that his -- this is what certain cultures do is
9 send back money, maintain ties to the old country, support
10 their families, gather in the relevant communities here in
11 the United States, and this has been a time-told history of
12 migration and the constituent parts of migration from, my
13 gosh, the 18th century, the late 18th century into the 19th
14 century with the great waves of migration.

15 So I understand -- I certainly understand the point
16 you're making, and perhaps it is easy to slide from that --
17 that habit of sending money home, supporting your people,
18 your family, into that kind of activity which extends out of
19 that kind of a context and into a more nefarious realm, which
20 is certainly what happened in this case. But all in all, I
21 can certainly see how that occurred, the transition of how
22 that happened.

23 Obviously there's no denying the tragedy suffered
24 by Mr. Nasir specifically with the loss of a child to
25 malnutrition and other illness, and I'm sure that he will

1 forever live with the belief that had he not been apprehended
2 and had he been available for his child in both material and
3 nonmaterial ways, that he would have been able to save the
4 life of that child. We'll never know if that's true, but
5 that -- I'm sure that is something that he has to live with.
6 There are collateral consequences here, that being one of
7 them and, in great probability, the fact that he's going to
8 lose any legal right to be here in the United States and
9 ultimately will be deported. So I understand the sad nature
10 of this case in particular. I don't know that the
11 consequences of -- to be suffered, collateral consequences to
12 be suffered by Mr. Nasir and those which he's already
13 suffered were suffered by any of the co-defendants to the
14 extent experienced by Mr. Nasir.

15 In any event, I think the history and
16 characteristics of Mr. Nasir do call for mitigation here, as
17 indicated. He's a man with a modest personal history,
18 approximately a seventh grade education, as I recall, and
19 then what he's done since then to better his lot in life and
20 then ultimately raise his family.

21 The sentencing purposes, obviously there are
22 primary sentencing purposes here -- and they're related --
23 sentencing purposes of, one, promoting respect for those U.S.
24 laws that proscribe terrorism and the support of terrorism
25 and support of foreign terrorists and their organizations;

1 two, protecting the public from this kind of activity; and
2 three, deterring others from similar conduct -- general
3 deterrence as opposed to specific deterrence -- are all very,
4 very important considerations here, and they in turn must be
5 served.

6 So for all of these reasons, including the need
7 obviously and the continuing need for custody and to avoid
8 unwarranted sentencing disparity between Mr. Nasir and other
9 defendants, between Mr. Nasir and other cases that have been
10 brought to the attention of the Court, to provide a
11 sufficient but no greater than necessary custodial sentence,
12 to buttress these sentencing purposes, I would find that a
13 sentence of six years would be fair, just, and reasonable
14 and, as I say, support these primary sentencing purposes that
15 have been discussed.

16 Accordingly, pursuant to the 1984 Sentencing Reform
17 Act, it is the judgment and sentence of the Court the
18 defendant be and hereby is committed to the custody of the
19 Bureau of Prisons for a term of six years for each of the
20 counts of conviction, Counts 1, 2, and 3, with those terms
21 imposed concurrently to one another, for a total of six years
22 in custody.

23 No fine is imposed in connection with any of these
24 counts. The Court will assess a \$100 special assessment in
25 connection with Count 1 and waive the special assessment in

1 connection with Counts 2 and 3.

2 There's no -- there was a reference to restitution
3 somewhere in the PSR or in the addendum to the PSR and the
4 fact that it would not be appropriate here. I don't recall
5 any suggestion that restitution would be appropriate in a
6 case such as this. Mr. Cole, did you want to be heard with
7 respect to that?

8 MR. COLE: Yes. We're not asking for any
9 restitution. Our view is that the -- ultimately the victim
10 is society; we couldn't identify any individual specifically,
11 specific victim of the violence.

12 THE COURT: All right. Thank you. Following
13 completion of the custodial sentence in this case, the
14 defendant is to be placed upon a three-year period of
15 supervised release concurrently imposed for each of the
16 counts of conviction.

17 If by some chance the defendant is permitted to
18 remain in the United States legally, then the standard
19 conditions of supervision would apply as well as the
20 following special condition or special conditions: That the
21 defendant submit to a search of his person, property,
22 vehicle, abode, or residence at a reasonable time under
23 reasonable circumstances by a probation officer based on
24 reasonable suspicion. And, Mr. Nasir, I would order that you
25 advise the other residents of the premises that the premises

1 are subject to search pursuant to this condition.

2 That you report all vehicles owned or operated or
3 in which you have an interest to Probation; that you keep
4 your whereabouts known to Probation at all times; that you
5 not leave the district without prior approval from Probation
6 and the Court.

7 If you are deported, then the -- or removed -- the
8 special condition would be that if excluded, removed, or
9 allowed to voluntarily turn to Somalia or some other country
10 for transit to Somalia, that you neither attempt unlawful
11 entry into the United States nor enter the United States
12 unlawfully, and that you report to Probation within 24 hours
13 of any lawful entry into the United States during that
14 three-year period of time. Supervision then would be waived
15 upon deportation, exclusion, removal, or voluntary departure.

16 Mr. Nasir, you have an absolute right to appeal
17 from both the judgment, that is, the convictions and the
18 sentence imposed for these counts of conviction. If you wish
19 to appeal, you must file a written notice of appeal within 14
20 days of today. That notice of appeal must be filed with the
21 clerk of this court, the U.S. District Court for the Southern
22 District of California, rather than with the Ninth Circuit
23 Court of Appeals. You must specify what it is you are
24 appealing from. You should keep the appellate authorities
25 advised of your whereabouts at all times while your case is

1 on appeal so that if they do need to be in contact with you,
2 they may contact you. If you cannot afford the services of
3 legal representation while your case is on appeal, those
4 services will be provided at no cost to you. Mr. Nasir, do
5 you understand what I have told you about your appellate
6 rights?

7 THE DEFENDANT: Yes.

8 THE COURT: Do you have any questions about your
9 appellate rights?

10 THE DEFENDANT: No.

11 THE COURT: Mr. Durkin, if you come forward,
12 please, we'll have you provided with a copy of the terms and
13 conditions of supervised release.

14 MR. DURKIN: Judge, can I just address the
15 appellate issue? I think what he was hesitating over is --
16 as you know, he was indigent early when he submitted an
17 affidavit. We were paid by third parties here from the
18 Muslim Legal Foundation, and they have no more money
19 available for an appeal, and I've informed him of that. I've
20 told him that we will be filing the notice of appeal on his
21 behalf, which he's requested us to do, but he's also
22 requested we seek an appointed lawyer for him.

23 THE COURT: Well, I was going to suggest that you
24 go ahead and you file your notice, get the written notice of
25 appeal on file -- you can do that; that may be your last

1 participation in this case, Mr. Durkin -- and that the
2 magistrate judge -- just coordinate with the magistrate judge
3 in this -- I think that would be Judge Gallo -- or the duty
4 judge if the duty judge is going to do that. They'll make --
5 they'll make the appropriate appointment of counsel for
6 appeal.

7 MR. DURKIN: Great. Thank you.

8 THE COURT: So if you come forward, please, we'll
9 have you provided with a copy of the terms and conditions of
10 supervised release in written form, and if you would kindly
11 provide those to your client, it would be appreciated.

12 MR. DURKIN: I shall, Judge. I'm going to tender
13 it to him right now.

14 THE COURT: All right. Thank you very much. Mr.
15 Nasir, good luck to you. Mr. Cole, anything further?
16 Ms. Han?

17 MR. COLE: No, your Honor. Thank you.

18 MS. HAN: No, your Honor.

19 THE COURT: All right. Thank you very much. Mr.
20 Durkin, good luck to you, sir.

21 MR. DURKIN: Thank you.

22 (The proceedings were concluded.)

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Certificate of Reporter

I hereby certify that I am a duly appointed, qualified, and acting Official Court Reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the mentioned cause on the date or dates listed on the title page of the transcript; and that the format used herein complies with the rules and requirements of the United States Judicial Conference.

Dated February 27, 2014 at San Diego, California.

/s/ Debra M. Henson (electronic)
Debra M. Henson
Official Court Reporter